2586

No. 12275

United States

Court of Appeals

For the Ninth Circuit.

F. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, Individually and as Co-partners, Doing Business Under the Firm Name and Style of Associated Packing Company,

Appellants,

vs.

AGRICULTURAL INSURANCE COMPANY, FEDERAL UNION INSURANCE COMPANY, GLOBE AND RUTGERS FIRE INSURANCE COMPANY, THE HOMESTEAD FIRE INSURANCE COMPANY and NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States in and for the Southern Division of the Northern District of California

No. 26235 H

P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of ASSOCIATED PACKING CO.,

Plaintiffs,

vs.

AGRICULTURAL INSURANCE COMPANY, a Corporation; FEDERAL UNION INSURANCE COMPANY, a Corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a Corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a Corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation; BLUE COMPANY, a Corporation; GEORGE A. LEVY, JOHN DOE, JANE DOE and RICHARD ROE,

Defendants.

AGREED STATEMENT OF FACTS

On or about August 1, 1945, the above-named insurance company defendants issued to plaintiffs their respective policies of insurance under provi-

sional reporting form (monthly average), covering

> "merchandise of every description (except as hereinafter excluded) consisting principally of Lumber * * *"

for the provisional amounts of $8,500 each, being 20% of the total contributing insurance. The limit of liability for all contributing insurance shown under Item No. 1 of each said policy was $70,000 at the described location, "west side of East 2nd Street, between 'B' and 'D' Streets, Benicia, California," and under Item No. 3, $15,000 at "Benicia Arsenal Grounds, Benicia, California" and under Item No. 10, $2,500 "at any other location within the above-named geographical limits where the insured may have property as above described * * *." Each said policy contained, among others, the following standard provisions prescribed by the laws of the State of California (California Insurance Code, Sec. 2071), viz:

" 85 Duty of insured in case of loss. * * *

89 Within sixty days after the commencement of the fire the insured shall render to the company at its main office in

90 California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth:—

91 (a) his knowledge and belief as to the origin of the fire; (b) the interest of the in-

sured and of all others in the property; (c) the

92 cash value of the different articles or properties and the amount of loss thereon; (d) all incumbrances thereon; (e) all other

93 insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the descriptions and schedules in all

94 other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or prop-

95 erties are insured in each of the other policies; (g) any changes of title, use, occupation, location or possession of said property

96 since the issuance of this policy; * * *

* * * *

109 Ascertainment of amount of loss. This company shall be deemed to have assented to the amount of the

110 loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified

111 amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit

112 that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total

disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the

company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such

notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a

disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such

demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the

two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

* * * *

If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and

completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced

by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement.

* * * *

Apportionment of loss. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

Loss when payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt."

A fire occurred on or about October 6, 1945, which destroyed all of the property described in said policies except 1% thereof.

On the 4th day of December, 1945, within the time prescribed by said standard form California fire insurance policy, plaintiffs furnished the defendant insurance companies and each of them with

proofs of the loss under said policies, and performed all the conditions of such standard form policy on their part to be performed.

The property insured and above described, together with two machines, had been purchased from the Government at Benicia Arsenal, on June 26, 1945, for Sixteen Thousand Dollars ($16,000), under an invoice (Plaintiff's Exhibit 17) describing it as

> "Crate, Fabricated Wood, Ponderosa and Sugar Pine. For full description of property, see attached Form No. 1076."

Form 1076 contains the following description:

> "Quantities Are Approximate
>
> Troughs, wood, Ponderosa and Sugar Pine grades ranging from #1 to #3, average #2. Dressed on 2 sides and worked. Air dried. Water stained. Mfd. by Columbia Steel Mills, Minotto, N. Y.; stacked in 9 piles. Troughs of various lengths and widths ranging from 26 to 43 in. long, 1½ to 3 in. bottoms and 2½ in. sides ¾ in. thick. Nails spaced about 8 in. apart. Some indication of discoloration and decay due to open storage.
>
> Quantity—4,470,408 brd. ft.

* * * *

> Description and Location
>
> Approximately 25% of troughs in bundles of 8 to 12 troughs each. Balance loose and mixed in piles along with some wood slats ¾ in. thick, 2 in. wide and 26 to 43 in. long.

Pile # 1— 851,220 brd. ft.
Pile # 2— 76,068 brd. ft.
Pile # 3—1,031,580 brd. ft.
Pile # 4— 871,740 brd. ft.
Pile # 5— 560,880 brd. ft.
Pile # 6— 423,360 brd. ft.
Pile # 7— 350,100 brd. ft.
Pile # 8— 198,180 brd. ft.
Pile # 9— 107,280 brd. ft.

The verified proof of loss served on each of the defendant insurance companies on December 4, 1945, represented plaintiffs' claim as

> "Approximately 5,000,000 board feet. Troughs were Ponderosa and Sugar Pine. Grades predominately #1 Grade. Dressed on two sides and worked. Air Dried, Water stained to prevent deterioration. Manufactured by Columbia Steel Mills, Winneto, New York. Ranging from 26 to 43 inches long. ⅓ to 3-inch bottoms, and 2½-inch sides; ¾ inches thick; nails spaced about 5 inches apart. Valued at $125,000."

Defendant insurance companies disagreed as to the amount of loss claimed, but admitted a loss of $14,320.

Suit was instituted by plaintiffs on June 24, 1946, in the State court, and was removed to the United States District Court on July 3, 1946. In the veri-

fied complaint, consisting of four counts, it was alleged:

> "that said property consisted of 5,000,000 board feet of lumber; that the value of said lumber at all of said times was $125,000."

The first cause of action alleged the issuance of the policies described therein, annexed thereto and made a part thereof, by the defendant insurance companies, all of which contained the standard provisions prescribed by the laws of the State of California, and particularly those hereinbefore set forth. Said first count was based upon an alleged oral contract between said defendant insurance companies for insurance coverage on said property in the amount of $25,000 in each of said defendant companies. Recovery in the sum of $24,750 was sought from each company, or a total of $123,750.

The second cause of action alleged an oral contract of insurance for $125,000 entered into by defendant Agricultural Insurance Company, by and through its agent, the defendant George A. Levy. A judgment under this count was sought in the sum of $123,750.

The third cause of action alleged insurance coverage of $87,500 evidenced by said policies of insurance attached to and made a part of the complaint, and sought judgment against each of the defendant insurance companies in the sum of $17,325, or a total of $86,625.

The fourth cause of action was for $37,125 damages against the defendant Levy as the broker of

plaintiffs, based upon a contract between said Levy and plaintiffs, by which he allegedly undertook and agreed to procure the additional amount of coverage in said sum of $37,500.

The case was tried January 6th to 10th, inclusive, 1948, and was to be submitted upon the written arguments of counsel. At the conclusion of the trial in January, 1948, the court ordered the fourth count, as to the defendant Levy, dismissed and announced that the evidence was insufficient to charge the defendant insurance companies upon the alleged oral contract set forth in Count 1, and that the evidence was also insufficient to charge the defendant Agricultural Insurance Company under Count 2. The court further announced that the total amount of insurance covering the property insured on the date of the fire at the location described in the policies was $70,000 and not $87,500. The court then announced that the sole question for determination was: "What was the market value, on October 6, 1945, of the lumber and shell troughs destroyed by the fire."

In plaintiffs' opening brief filed February 4, 1948, it was contended that the Government invoices showed the quantity of lumber to be 5,078,-950 board feet and that actual measurements according to the testimony of witnesses showed 5,800,-000 board feet. In a "Summary of Minimum Valuation (Market Value) Testified by Witnesses on Behalf of Plaintiffs of Shell Crate or Ammunition Case Lumber Material" furnished to the Court at

the conclusion of the trial, the following valuations were submitted:

Brydeson E. Cannon

Minimum valuation for shell troughs $10 per thousand times 5,000,000 board feet equals	$ 50,000.00
Minimum valuation for slats $75 per thousand times 800,000 board feet equals	60,00.000
Total	$110,000.00

Claude J. Falconer

Minimum valuation for shell troughs $20 per thousand times 5,800,000 board feet equals	$116,000.00

C. W. Carlstrom

Minimum valuation $30 per thousand for shell troughs times 5,000,000 board feet equals	$150,000.00
$90 per thousand for clear slats times 800,000 board feet equals	72,000.00
Total	$220,000.00

In plaintiffs' closing brief filed February 11, 1948, plaintiffs contended that the valuation given by the witness C. W. Carlstrom was $30 per thousand, representing a total of $132,771.12. This witness testified to an average valuation for each size (length) of troughs of $35 per thousand (p. 140, line 20) and $90 to $110 per thousand for the slats (p. 137, line 9). It was also contended, as testified

to by the witness Benson, that he made a tentative offer of $22.50, which represented a total valuation of $114,276.37. This offer was conditioned upon plaintiffs awaiting payment for the material until Mr. Benson had sold the material or articles manufactured therefrom. Plaintiff Mrs. Taitt corroborated the testimony of this offer.

In said closing brief counsel for plaintiffs admitted error in their previous argument brief in contending that the total quantity shown by the invoice of the War Assets Administration was 5,078,950 and stated that the said invoice showed a total of 4,470,408 board feet only. It was also therein stated:

> "In the face of the record, we feel impelled to accept as accurate the total quantities shown in the itemization by pile on the 'Bid and Contract Form Surplus Sales Continuation Sheet.'
>
> Deducting one per cent or 44,704 from 4,470,-408 leaves 4,425,704 feet net, which was destroyed by the fire.
>
> * * * *
>
> We apologize to the Court for what now appears to us an erroneous contention on our part as to the quantity of lumber contained in the shell troughs and slats.
>
> * * * *
>
> Before leaving this subject of quantity, we wish to make clear that we do not recede in the least from the position that credible, dependable, expert testimony was given at the trial to the effect that by measurement the actual

amount of shell troughs and lumber in board feet was approximately 5,570,000 * * *."

In said closing brief plaintiffs claimed that of the 4,425,704 board feet shown by said invoice, 690,-142 board feet represented slats in the total quantity of 1,650,089, and that such calculations were predicated upon their interpretation of the testimony of defendant insurance companies' witness A. L. Miller, foreman of the carpenter shop at Benicia Arsenal, that on the larger sized crates there were three slats to three troughs.

According to the testimony of said Miller, an attempt was made to break up the troughs by hand and by various machines built for that purpose. Said Miller testified, based on figures on the cost of breaking up troughs without pulling the nails, by use of the machines, to a cost of $38.33 per thousand. Witnesses Rose and Cohn testified to a cost of $67.17 per thousand for breaking up the troughs by hand, by carpenters employed by them.

The witnesses Taitt, Forbes and Cleu testified in effect that the trough could be separated, by use of the machines delivered to the plaintiffs, at a cost of from $3.50 to $7.50 per thousand board feet.

Said witness Cohn testified that the market price of the type of lumber exhibited, in commercial sizes of 8 ft. to 26 ft. lengths and 1 ft. x 6 in. to 1 ft. x 8 in., based on actual purchases, was $52.75 per thousand for No. 2 common. The witness Cohn admitted on cross-examination that he had been used as a witness by fire insurance companies in actions involving fire losses on numerous occasions—

perhaps twenty times. The witness Rose likewise testified that he had been a witness on behalf of insurance companies in similar cases numerous times. He also testified that he had no experience in buying and selling used lumber. Cohn testified that the lumber had no value. Otto Bernhard Gall testified that the material was not feasible as lumber, had no value for his purposes. On cross-examination he admitted that the slats were worth 6 cts. each.

On March 29th the court made an Order vacating the submission of the case and ordered

> "that this case be placed on the calendar for May 21, 1948, for the purpose of taking further testimony."

The further trial proceeded on May 27th and 28th, and again on October 27th and 28th and on November 5th, at which time the taking of testimony was concluded, upon reopening the case for further trial, evidence was introduced on behalf of plaintiffs as to the quantity of the troughs and slats, also as to the efficiency of the automatic separator and nail puller.

Plaintiffs offered to prove that the appraised value of the lumber material sold to plaintiffs by the Government (as evidenced by document contained in the records of the War Assets Administration—Plaintiffs' Exhibit No. 29 for identification) was $55 per thousand or a total of $262,-607.40.

A witness (G. R. Tully), was called on behalf

of plaintiffs, who testified that he had been in the wholesale lumber business for thirty years, sales manager for seven years, and was a qualified inspector of lumber for forty years, buying and selling lumber; that he was employed by Hallinan Mackin Lumber Company of San Francisco; that the wooden slat (Plaintiffs' Exhibit 16) was No. 1 clear. This witness was limited in his testimony to slats and was not permitted to testify to a valuation of the troughs. An offer was made that he would testify that the slats and troughs had a market value of $25 per thousand at the time of the fire.

After oral argument on November 12, 1948, the case was submitted and on February 18, 1948, the court made the following Order:

"ORDER

After a protracted trial, necessitated by the reopening of the case in order to adduce additional testimony with respect to the quantity of slats involved in plaintiffs' suit against defendants on insurance policies, and after careful study, review of the record and detailed brief prepared by both sides, the court is prepared to make certain findings. A pre-occupation with current trial work prevents a more extensive discussion of the facts; the following is a synopsis of the more controverted aspects of the case:

With respect to the troughs, the court finds that the quantity destroyed by the fire was 3,830,704. This number is derived by taking the quantity shown

on the government invoice as representing the total lumber (troughs and slats), in plaintiffs' possession, subtracting therefrom 500,000 board feet which were used in the box factory, deducting 1% of the total which remained after the fire and subtracting the further sum of 100,000 board feet representing 200,000 slats destroyed by fire and for which allowance is made elsewhere in this order.

Testimony as to value was so conflicting as to make the court's task of ascertaining actual worth of the troughs all but impossible. The testimony offered by plaintiffs in connection with the possible commercial advantages and purposes to which the lumber contained in the troughs might be suited was not convincing and no predicate was established for a value save and except a bare minimum value for the troughs as is. The realities of the situation are ever present and notwithstanding the hopeful expectations of plaintiffs as to the possible uses to which the lumber might have been put, the fact remains that there was no credible testimony indicating an immediate commercial use for the lumber contained in the troughs.

The court finds that the machine processes for disassembling the troughs proved to be ineffectual up to the time of the fire. The court also finds that the technique of stripping the troughs by hand or sawing off the nailed sections of the troughs and breaking them down in this manner was so costly as to make the operation economically unsound.

Accordingly, the court finds that the reasonable market value of the troughs at the site of the fire was $5.00 per thousand board feet.

Applying the court's determination as to value of the troughs "as is" to the quantity of board feet destroyed by the fire (excluding slats) the court finds that the troughs had a value of $19,153.52.

With respect to the slats involved in the litigation: The court once more is compelled to express concern at the great variation in figures disclosed by the testimony of the witnesses and as revealed by the documents submitted in evidence. From these variations the court has been forced to choose an amount certain, which it deems to be the most accurate estimate of the quantity of slats on hand and destroyed by the fire. Admittedly, this amount must be an estimate, for the record discloses that unknown numbers of slats were removed by Italian prisoners of war and were not accounted for and unknown quantities were diverted while en route to Benicia Arsenal. Accordingly, the court finds that there were 200,000 slats in the pile of lumber which was destroyed by the fire.

Although there are variations in the estimated value of the slats, the range is not so great as it is for the troughs. In view of the testimony of defendants' witness Frazier that the slats were worth 6c per slat the court is prepared to find that this figure represents their value.

Applying a value of 6c per slat to the quantity found by the court to have been destroyed by fire, we reach a figure of $12,000 for the slats. This figure, added to the value of the troughs as set forth above, gives a total loss to plaintiffs of $31,153.52 caused by the fire, and the court so finds.

At the conclusion of the trial defendants withdrew their original offer of $14,360 which had been tendered to plaintiffs at the outset of the trial and charged plaintiffs with fraud. Although the record is replete with inconsistencies and backtrackings on the part of several of plaintiffs' witnesses, the court is not prepared to hold that such inconsistencies attain the stature of fraud.

Based on the entire record, the court renders judgment in favor of plaintiffs and against defendants in the amount of $31,153.52, together with their costs. Plaintiffs to prepare Findings of Fact and Conclusions of Law in accordance with this Order.

Dated: February 18, 1949."

Thereafter proposed Findings of Fact and Conclusions of Law and proposed form of Judgment were submitted by plaintiffs' counsel. Concurrently therewith plaintiffs submitted a written Memorandum in support of findings that plaintiffs were entitled to interest on the amount found due by the court from and after the 4th day of March, 1946, as provided by the terms of the policies. Defendant insurance companies and defendant Levy filed written objections to the proposed Findings of Fact and Conclusions of Law and of form of Judgment, and the defendant insurance companies filed concurrently therewith a Memorandum in Opposition to the Allowance of Interest on said amounts found due by the court. Thereafter, to wit, on March 25, 1949, the court made the following Order with reference to the allowance of interest:

"Order With Respect to Interest Allowance

The briefs on file have been considered.

The Court is not persuaded to depart from the rule of this Circuit in National Union Fire Insurance Co. v. California C. Credit Corp., 76 F. (2d) 279.

The factual background does not permit or justify the application of Koyer v. Detroit F. & M. Ins. Co., 9 Cal. (2d) 336, upon which plaintiff relies. Section 3287 of the California Civil Code must be read and interpreted in the light of the whole record before this Court.

Accordingly, the Koyer case is not controlling in the situation presented in the case at bar.

Suffice to say that it remained for this Court to ascertain the amount of liability from the evidence introduced at the trial.

The proposed findings of fact and conclusions of law must, therefore, be modified on the question of allowance of interest.

Dated: March 25, 1949."

In accordance with the directions of the court contained in said Order Disallowing Interest, plaintiffs, in obedience thereto, caused to be prepared and filed with the court revised or amended Findings and Judgment, which were entered March 31, 1949.

Thereafter, to wit, on April 7, 1949, plaintiffs filed Notice of Motion to Alter or Amend the Findings of Fact and Judgment entered and on the same day also filed a notice of motion to Withdraw the moneys paid into court by defendant insurance companies on April 1, 1949. Said motions came on for

hearing on the 11th day of April, 1949, at which time an Order was made reading as follows:

"Order Amending Findings of Fact, Conclusions of Law, and Judgment

"The Notice of Motion to Alter or Amend the Judgment herein having been served within ten days after the entry of judgment, pursuant to Rule 59 of the Federal Rules of Civil Procedure, and said motion having come on regularly for hearing this 11th day of April, 1949, Neil Cunningham appearing for the plaintiffs and H. A. Thornton appearing for the defendant insurance companies, and the Court having considered the matter,

It Is Hereby Ordered that the Findings of Fact and Conclusions of Law heretofore made and entered herein be and they are hereby amended as follows:

There shall be added to Finding X, page 7, at line 4, the following:

'13. That plaintiffs are not entitled to interest on said sums due under said policies above listed.'

It Is Hereby Further Ordered that the Conclusions of Law be and the same are hereby amended in the following particular:

There shall be added thereto Paragraph 8-a on page 9 between lines 16 and 17, reading as follows:

'8-a. That plaintiffs are not entitled to interest on each said amount from the 4th day of March, 1946.'

It Is Further Ordered that the Judgment heretofore entered herein be and the same is hereby amended in the following particular:

On page 2, between lines 24 and 25 there shall be added the following paragraph:

'It Is Further Ordered, Adjudged and Decreed that the plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs, and that plaintiffs take nothing as and for interest on said amounts.'

Done in open court this 11th day of April, 1949."

At the time of making the last above quoted Order the following colloquy and comment between the Court and counsel took place:

"The Court: I think I can order a pro tanto satisfaction of judgment with respect to the full amount of thirty-one odd thousand dollars, save and except as to the disputed item of approximately $6,000 as and for interest claimed by the plaintiff. With respect to interest, it appears to this court there is a dispute thereon, and there is a possibility the parties can reach a stipulation.

The court will enter an order pro tanto in satisfaction of judgment on the tender of $31,000 to your client without prejudice to their right to dispute the matter of interest.

However, I desire there be a full and complete exposition to our Circuit Court of the factual background.

Mr. Thornton: Either by the filing of the entire transcript or by an agreement of the parties satisfactory to the court.

The Court: Either by agreement or by the full

transcript. I think you can get up an agreed statement, and I will aid and assist you.

Let us see the nature of the stipulation on the agreed statement of facts.

Mr. Cunningham: Your Honor will grant our motion to amend the judgment in respect to the denial of the interest?

Mr. Thornton: I think there should be a bond for costs on appeal. We have overpaid costs but I didn't ask to retax them, but I think they should be. He has asked for a waiver of that.

Mr. Cunningham: Waiver of what?

Mr. Thornton: That you be required to file no bond.

The Court: For the reason heretofore stated, it is the order of this court that plaintiffs are not entitled to interest on the judgment on the amount claimed. That is the order of the court. I have made that clear in my minute order. So any provision in your findings and any provision in your proposed judgment are to be amended accordingly, to delete therefrom any claim with respect to interest.

Mr. Cunningham: But the judgment itself does not show that. In other words, if we went up to the Circuit Court of Appeals from the judgment alone on the question of interest, the court could not see from the judgment itself that interest was not allowed. It would neither be affirmative or negative because there is no statement in the judgment itself that interest was disallowed.

Mr. Thornton: I don't quite agree with the verbiage.

The Court: I think I can affirmatively rule that interest is not allowed. You can amend the judgment and include an additional paragraph in the light of the findings that the court concludes that interest is not allowed.

Mr. Cunningham: Shall I prepare an amended judgment?

The Court: You might prepare a supplement to the judgment.

Mr. Thornton: I have no objection to that at all.

The Court: If you desire to have the matter clearly focused in the judgment you can include that.

Mr. Thornton: But I understand there is a pro tanto satisfaction.

The Court: Yes, and I would have to approve it and you gentlemen will have to stipulate to it.

Mr. Cunningham: Will you prepare that?

Mr. Thornton: No, I won't. I submitted one proposed satisfaction.

Mr. Cunningham: I never saw it.

Mr. Thornton: It was submitted to your office.

The Court: I will aid and assist counsel in any fashion on this matter.

Mr. Thornton: I will try to devote time in the meantime, but I would like to make it very clear that I won't agree to any statement of facts that does not give the factual issue on the various claims that were made on quantities and values. Outside of that I would like to see them pass on it.

The Court: I have no doubt presently that this factual background is vital.

All right, that is all."

The Court ordered the release of the moneys paid into court, reserving and preserving to plaintiffs their right of appeal from that portion of the judgment which denied to them the recovery of interest, and included the following provision in said Order:

"It Is Further Ordered that plaintiffs, in the event of appeal from that portion of the judgment denying recovery of interest, pursue such appeal upon an agreed statement of facts, or if such agreement be not reached, then upon the entire record or such portions of the record as the respective parties may designate in accordance with the provisions of Rule 75A, F. R. C. P."

Said Order was filed on the 14th day of April, 1949, at which time the following colloquy took place between Court and counsel:

The Court: Are you satisfied, Mr. Thornton? (with Court order)

Mr. Thornton: I understand your Honor signed it.

The Court: Have you had an opportunity to read it (order denying interest)?

Mr. Thornton: Yes, I think it covers it sufficiently so that everybody is protected. In other words, I think we are in a position—We have a very simple question, I believe, provided counsel can agree. In fact, there may be some trouble, because in my opinion it may be necessary to advance a different position and theorization, in order to show whether or not it is possible for us ever to

reach an amount under the code section. That, I think, is necessary. Those things are set forth in the proofs of loss, in the pleadings, and in the various statements filed by counsel. I think that we should be able to reach an agreement. However, I think your order does sufficiently protect us under 75 and 75-A, so that if we cannot get together we can procure a complete transcript.

The Court: Yes, I think the order is sufficient. However, if such an agreement be not reached, then the entire record, or such portions of the record as are pertinent, may be produced. However, the order is that a full and complete exposition be given to our court of appeals, and under that they have a composite of this trial. Otherwise, I cannot see how a reviewing body could entertain and pass upon that legal question concerning the legality of the interest.

Mr. Thornton: That was the ground of my objection. I am glad to have the court again state that. And, if there is any question on that, I ask the court's permission to have the court's statement on the last hearing, and as of today, made a part of the record.

The Court: You may have that in amplification of my former brief memorandum.

I think I made it clear that the order may be read upon the record and the receipt signed.

The parties hereto have accepted the judgment of the Court, the defendants by paying the amount provided therein and the plaintiffs by accepting said amount in full satisfaction of all claims, save

and except as to plaintiffs' asserted right to interest and the right to appeal from that portion of the judgment denying them recovery of any interest on the amounts awarded by the Court.

This appeal is from that portion of the Judgment denying the plaintiffs interest on the amount found due by the Court, and the only subject for consideration by the Circuit Court of Appeals is the correctness of the Court's ruling denying plaintiffs' claim for interest.

The foregoing constitutes and is an agreed statement made by and between the above-named plaintiffs and the above-named defendant insurance companies under and pursuant to Rule 76 of the Federal Rules of Civil Procedure. A copy of the Notice of Appeal showing its filing date is attached hereto; also a Concise Statement of Points Relied upon by Appellants.

/s/ NEIL CUNNINGHAM,
Attorney for Plaintiffs-
Appellants.

THORNTON & TAYLOR.
/s/ H. A. THORNTON,
/s/ E. M. TAYLOR.
Attorneys for Defendant
Insurance Companies.

Approved:

/s/ GEORGE B. HARRIS,
Judge, U. S. District Court.

[Endorsed]: Filed June 17, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiffs hereby appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the Final Judgment entered in this action, as ordered amended on the 11th day of April, 1949, and that portion only which orders, adjudges and decrees that plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs, from the 4th day of March, 1946, and ordering that plaintiffs take nothing as and for interest on said amounts.

Dated this 9th day of May, 1949.

/s/ NEIL CUNNINGHAM,

/s/ JAY PFOTENHAUER,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 10, 1949.

CONCISE STATEMENT OF POINTS RELIED UPON BY APPELLANTS

The contract of insurance clearly provides for the manner of ascertainment of the amount of loss and that such loss "shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after

the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt."

Under the decision of Koyer v. Detroit Fire & Marine Insurance Company, 9 Cal. (2d) 336, the Supreme Court of California held that Section 3287 of the California Civil Code, providing when a person is entitled to recover damages, he may also recover interest thereon, was applicable to a fire loss case by reason of the provisions of the policy itself.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon the making of an Order by the Court on January 6, 1948, denying the motion of the defendant Levy for severance and the denial of the motion of the defendant Insurance Companies for summary judgment in favor of said defendants and each of them on the Fourth and Separate Cause of Action stated in the complaint, plaintiffs agreed to waive a jury which had been called, and the case proceeded to trial before the Court on the 6th, 7th, 8th, 9th and 10th days of January, 1948. Pursuant to a further order of said Court made on the 29th day of March, 1948, the order theretofore entered submitting said case was vacated and set aside, and the case was ordered placed on the calendar for May 21, 1948, "for the purpose of taking

further testimony"; Neil Cunningham and Jay Pfotenhauer appeared for and on behalf of the plaintiffs, Thornton & Taylor, by H. A. Thornton, appeared for and on behalf of the defendants Agricultural Insurance Company, Federal Union Insurance Company, Globe and Rutgers Fire Insurance Company, The Homestead Fire Insurance Company and New Hampshire Fire Insurance Company, and Wolff & Wolff, by Harry K. Wolff, Sr., appeared for and on behalf of the defendant George A. Levy:

Evidence both oral and documentary was taken and received at the trial in January, 1948, and at subsequent hearings on further trial by the Court, on the 27th and 28th days of May, the 27th and 28th days of October and the 5th day of November, 1948, at the conclusion of which, said cause was argued and submitted.

Upon conclusion of the initial trial on January 10, 1948, pursuant to motion of the defendant Levy, the cause was dismissed as to him upon the fourth cause of action set forth in the complaint.

Upon consideration of all of the foregoing and the evidence, both oral and documentary, introduced at the trial and further trial of said cause, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

As to the First Cause of Action stated in plain-

tiffs' complaint, the Court finds that the allegations contained in Paragraphs I, III, IV, V, VI and VII are true.

II.

As to Paragraph VIII of said first cause of action, the Court finds that the plaintiffs were the owners of all the property described in the policies mentioned and designated in Paragraphs III, IV, V, VI and VII (and which said policies are attached to the complaint and are marked Exhibits "A," "B," "C," "D" and "E"); that said property consisted of 3,970,408 board feet of lumber, consisting of troughs and slats, and 202,020 pieces called slats; that the value of said lumber so insured by said policies was $31,468.21.

III.

With reference to Paragraph IX of the first cause of action set forth in the complaint, the Court finds that if it was the intention of plaintiffs to have the said lumber insured for the amount of $125,000 for the term of one year by the standard form of fire insurance policy prescribed by the laws of the State of California and/or that it was not the intention of plaintiffs to have said lumber insured in a provisional amount or for a fluctuating amount which would require the filing of monthly or other periodical reports showing the value or quantity of lumber on hand, such intention was not communicated, known to, or acquiesced in by the defendants Agricultural Insurance Company, Federal Union

Insurance Company, Globe and Rutgers Fire Insurance Company, The Homestead Fire Insurance Company and New Hampshire Fire Insurance Company.

IV.

It is true that the policies of insurance described in the first cause of action set forth in the complaint herein were delivered to plaintiffs on or before September 5, 1945; it is true that plaintiffs then learned they had not received the form or type of insurance desired and requested by them; it is true that hereafter, to wit: on or about the 2nd or 3rd of October, 1945, plaintiffs requested the defendant George A. Levy to obtain fire insurance covering said lumber in the sum of $125,000, and further requested said defendant Levy to obtain such insurance under the California Standard Form of Fire Insurance Policy without qualification or endorsements requiring the filing of monthly or periodical reports and without any limitation as to the value of said lumber except as to the amount of insurance provided for therein.

V.

It is not true that at said time said defendant insurance companies, or any of them, by or through said George A. Levy, orally or otherwise agreed to or did insure plaintiffs in the amount of $25,000 each, or a total of $125,000, for a term of one year beginning on said October 2nd or 3rd, 1945, or any other term or period, against all loss or damage by fire upon said stock of lumber which was then and there owned by plaintiffs; it is true that said George

A. Levy was an Agent of the defendant Agricultural Insurance Company, but was not an Agent for any of the other defendant insurance companies; that as such agent for defendant Agricultural Insurance Company he did not undertake to, nor did he, bind said defendant Agricultural Insurance Company to provide or furnish said insurance in the amount of $25,000 or in the amount of $125,000, as alleged in paragraph X of said first cause of action.

VI.

By reason of the foregoing Finding V, it is unnecessary to make findings upon paragraphs XI, XII, XIII, XIV and XV of the First Cause of Action set forth in the Complaint herein.

VII.

As to the Second and Separate Cause of Action stated in plaintiffs' complaint herein, the Court finds that George A. Levy was the duly appointed and licensed agent of the defendant Agricultural Insurance Company, as therein alleged, but that said defendant Agricultural Insurance Company did not, through said George A. Levy, its agent, enter into an oral contract of insurance, insuring plaintiffs in the amount of $125,000 for the term therein stated against loss or damage by fire upon and to 5,000,000 board feet of lumber and did not agree to execute and deliver or deliver to plaintiffs a policy of insurance in the standard form prescribed by the laws of the State of California, evidencing such contract of insurance.

VIII.

It is true, as alleged in said Second Cause, paragraph VI, that defendant Agricultural Insurance Company has never issued or delivered said policy of insurance for $125,000 to plaintiffs and has refused to do so.

IX.

By reason of the foregoing Findings as to the Second Cause, it is unnecessary to make findings upon Paragraphs V, VII, VIII, IX and X of said Second Cause of Action set forth in the complaint.

X.

As to the Third and Separate Cause of Action stated in plaintiffs' complaint herein, the Court finds:

1. The allegations of Paragraph I thereof, incorporating each and every allegation contained in Paragraphs I to VIII, inclusive, of the First Cause of Action, the same as though set forth in full, are true except as to Paragraphs II and VIII so incorporated, as to which separate findings are hereinafter made.

2. It is true that plaintiffs, at the times of the issuance of the policies referred to and described in Paragraphs III, IV, V, VI and VII of said First Cause of Action, and continuously after such issuance, up to and including the time of the fire herein mentioned, were the owners of all the property described in said policies and insured thereunder.

3. The quantity of board feet of lumber so in-

sured was 3,970,408, consisting of troughs and slats, 202,020 pieces of which were slats.

4. That the value of said lumber at the time of the fire was as follows: For the troughs, $5.00 per thousand board feet; For the pieces called "slats," 6 cents each.

5. It is true that the location and value of said lumber were reported to and known by the defendant insurance companies, and each of them, prior to the 30th of September, 1945.

6. It is true that on October 6, 1945, said 3,970,-408 board feet of lumber, consisting of troughs and slats, 202,020 pieces of which were slats, so insured, was, with the exception of one (1%) per cent thereof, totally destroyed by fire.

7. That the loss and damage sustained by plaintiffs by reason of such destruction by fire of said lumber was and is the sum of Thirty-one Thousand One Hundred Fifty-three and 52/100 Dollars ($31,153.52).

8. It is true that by reason of said loss and pursuant to the provisions of the policies hereinbefore referred to, said defendant insurance companies became liable to plaintiffs for said amount of $31,-153.52, and that each said defendant insurance company, in accordance with the terms of said policies, was liable to plaintiffs for twenty per cent (20%) thereof, in the amounts hereinafter set forth opposite their names, as follows:

Agricultural Insurance Company.....$6,230.70

Federal Union Insurance Company...$6,230.70
Globe & Rutgers Fire Insurance
Company $6,230.70
The Homestead Fire Insurance
Company $6,230.70
New Hampshire Fire Insurance
Company $6,230.70

9. That in accordance with the terms and conditions of said policies said amounts, and each thereof, became due and payable ninety (90) days after the filing of preliminary proofs of loss.

10. That preliminary proofs of loss were filed with and received by said insurance companies on December 4, 1945.

11. That the defendant insurance companies, and each of them, have not paid to plaintiffs the sums due under said policies above listed, nor any part of any of said sums.

12. That plaintiffs performed all the conditions of said policies on their part to be performed.

XI.

As to the Fourth and Separate Cause of Action stated in plaintiffs' complaint, the Court finds that the allegations of Paragraphs I and II are true.

XII.

As to the allegations contained in Paragraph III of said Fourth Cause of Action, the Court finds that on October 2, 1945, plaintiffs were the owners of 3,970,408 board feet of lumber, consisting of troughs

and slats, 202,020 pieces of which were slats, and which lumber was contained in and located upon the premises described in Paragraph III of said Fourth Cause of Action and was then and there insured in the sum of $87,500 against loss or damage by fire; it is not true that the value of said lumber was $125,000, but was $31,468.20.

XIII.

It is not true, as is alleged in Paragraph IV of said Fourth Cause of Action, that on or about October 2, 1945, or at any other time, at Vallejo, California, or elsewhere, said defendant George A. Levy orally contracted with plaintiffs to procure additional fire insurance upon and covering said stock of lumber which would increase the insurance coverage thereon to $125,000, nor is it true that plaintiffs did then and there agree to pay the additional premiums required therefor; it is true that said plaintiffs requested said defendant George A. Levy to procure additional fire insurance on said lumber at or about said time, but that the said George A. Levy did not agree to procure such insurance.

XIV.

It is true that on October 6, 1945, all said lumber was destroyed, with the exception of 1% thereof, by fire, but that the quantity insured was not 5,000,000 board feet but was the quantity hereinbefore stated, to wit, 3,970,408 board feet; it is not true that the loss and damage sustained by plaintiffs by reason of such destruction by fire of said lumber was or

is the sum of $123,750, but such loss and damage was and is the sum of $31,153.52.

XV.

It is not true that as a result of any undertaking on the part of the said defendant George A. Levy to procure said additional fire insurance or any part thereof, or as a direct or proximate result of any failure on his part so to do, plaintiffs were damaged in the sum of $37,125 or any other sum.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing Findings of Fact, the Court finds and concludes:

1. That defendant insurance companies issued and delivered to plaintiffs the policies of fire insurance attached to the complaint and marked Exhibits "A," "B," "C," "D" and "E."

2. That said policies were in full force and effect on October 6, 1945, on which date a fire occurred and destroyed ninety-nine (99%) per cent of the lumber described in said policies at the location therein stated, to wit: Benicia Tannery property.

3. That thereafter and within the time provided in said policies plaintiffs furnished to said defendant insurance companies, and each of them, proofs of loss covering the quantity and value of the lumber so destroyed, but the Court concludes that the quantity was not 5,000,000 board feet, but was as follows: 3,830,704 board feet of troughs and 200,000 slats.

4. That the value of the said troughs was and

is $5.00 per thousand board feet, or a total of $19,-153.52.

5. That the value of 200,000 slats destroyed by said fire was and is 6c each, or a total of $12,000.00.

6. That the total loss suffered by plaintiffs as a result of said fire was the sum of $31,153.52.

7. That by the terms of said policies of fire insurance (lines 138 to 140, inclusive) the loss thereunder became due and payable ninety (90) days after receipt by each said insurance company of the preliminary proof of loss; that the proofs of loss herein were made to and received by each said defendant insurance company on December 4, 1945.

8. That plaintiffs have judgment against defendant insurance companies and each of them, as follows:

Agricultural Insurance Company	$6,230.70
Federal Union Insurance Company	$6,230.70
Globe and Rutgers Fire Insurance Company	$6,230.70
The Homestead Fire Insurance Company	$6,230.70
New Hampshire Fire Insurance Company	$6,230.70

9. That plaintiffs have and recover their costs of suit herein, to be taxed against the defendant insurance companies.

10. That the plaintiffs take nothing against the defendant George A. Levy by reason of the allegations contained in the Fourth Cause of Action stated in their complaint, but that said defendant

George A. Levy have and recover his costs of suit herein against plaintiffs, to be taxed.

/s/ GEORGE B. HARRIS,
Judge of the Above-Entitled Court.

Service of the within Findings of Fact and Conclusions of Law is acknowledged, by receipt of copy thereof, this 25th day of February, 1949.

THORNTON & TAYLOR.

By /s/ K. NORWOOD,
Attorneys for Defendant Insurance Companies.

WOLFF & WOLFF.

By /s/ HARRY K. WOLFF,
Attorney for Defendant, George A. Levy.

Receipt of amended pages 2, 3, 5, 7, 8 and 9 of the Findings of Fact and Conclusions of Law, and of amended page 2 of the Judgment in the within case, as ordered modified by the Court, is hereby acknowledged this 28th day of March, 1949.

THORNTON & TAYLOR.

By /s/ THORNTON & TAYLOR.
Attorneys for Defendant Insurance Companies.

WOLFF & WOLFF.

By /s/ WOLFF & WOLFF,
Attorneys for Defendant George A. Levy.

[Endorsed]: Filed March 29, 1949.

In the District Court of the United States, in and for the Southern Division of the Northern District of California

No. 26235 H

P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of ASSOCIATED PACKING CO.,

Plaintiffs,

vs.

AGRICULTURAL INSURANCE COMPANY, a Corporation; FEDERAL UNION INSURANCE COMPANY, a Corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a Corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a Corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation; BLUE COMPANY, a Corporation; GEORGE A. LEVY, JOHN DOE, JANE DOE and RICHARD ROE,

Defendants.

JUDGMENT

This cause came on regularly for trial on the 6th day of January, 1948, and proceeded thereafter on the 7th, 8th, 9th and 10th days of January, 1948; after submission thereof, a further order was made

vacating said order of submission, and the cause was ordered placed on the calendar of the Court for the 21st day of May, 1948, "for the purpose of taking further testimony"; at that date the cause was continued to May 27th, 1948, and further trial was resumed on the 27th and 28th days of May, 1948, the 27th and 28th days of October, 1948, and the 5th day of November, 1948, at the conclusion of which said cause was argued and submitted; a jury having been waived on January 6th, 1948, said cause was tried before the Court; Neil Cunningham and Jay Pfotenhauer appeared as attorneys for Plaintiffs; Thornton & Taylor, by H. A. Thornton, appeared as attorneys for the defendants Agricultural Insurance Company, Federal Union Insurance Company, Globe and Rutgers Fire Insurance Company, The Homestead Fire Insurance Company and New Hampshire Fire Insurance Company; and Wolff & Wolff, by Harry K. Wolff, Sr., appeared as attorney for defendant George A. Levy; and the Court having heard the testimony and examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed that Plaintiffs have judgment against said defendant insurance companies as follows:

Agricultural Insurance Company, for $6,230.70

Federal Union Insurance Company, for $6,230.70

Globe and Rutgers Fire Insurance Company, for.....$6,230.70
The Homestead Fire Insurance Company, for.....$6,230.70
New Hampshire Fire Insurance Company, for.....$6,230.70

and for costs of suit herein, to be taxed.

It Is Further Ordered, Adjudged and Decreed that the plaintiffs take nothing against the defendant George A. Levy by reason of the allegations contained in the Fourth Cause of Action stated in their complaint, but that said defendant George A. Levy have and recover his costs of suit herein against plaintiff, to be taxed.

Dated: March 29, 1949.

/s/ GEORGE B. HARRIS,
Judge of Said Court.

Entered in Civil Docket March 3, 1949.

[Endorsed]: Filed Mar. 29, 1949.

[Title of District Court and Cause.]

ORDER AMENDING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The Notice of Motion to Alter or Amend the Judgment herein having been served within ten days after the entry of judgment, pursuant to Rule 59 of the Federal Rules of Civil Procedure, and said motion having come on regularly for hearing

this 11th day of April, 1949, Neil Cunningham appearing for the plaintiffs and H. A. Thornton appearing for the defendant insurance companies, and the Court having considered the matter,

It Is Hereby Ordered that the Findings of Fact and Conclusions of Law heretofore made and entered herein be and they are hereby amended as follows:

There shall be added to Finding X, page 7, at line 4, the following:

> "13. That plaintiffs are not entitled to interest on said sums due under said policies above listed."

It Is Hereby Further Ordered that the Conclusions of Law be and the same are hereby amended in the following particular:

There shall be added thereto Paragraph 8-a on page 9 between lines 16 and 17, reading as follows:

> "8-a. That plaintiffs are not entitled to interest on each said amount from the 4th day of March, 1946."

It Is Further Ordered that the Judgment heretofore entered herein be and the same is hereby amended in the following particular:

On page 2, between lines 24 and 25, there shall be added the following paragraph:

It Is Further Ordered, Adjudged and Decreed that the plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs,

and that plaintiffs take nothing as and for interest on said amounts."

Done in open court this 11th day of April, 1949.

/s/ GEORGE B. HARRIS,
Judge of Said Court.

Receipt of a copy of the above Order is hereby acknowledged this 11th day of April, 1949.

THORNTON AND TAYLOR.
By /s/ H. A. THORNTON,
Attorneys for Defendant
Insurance Companies.

[Endorsed]: Filed April 11, 1949.

[Endorsed]: No. 12275. United States Court of Appeals for the Ninth Circuit. F. W. Carlstrom and Mrs. George (Reta) Taitt, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of Associated Packing Company, Appellant, vs. Agricultural Insurance Company, Federal Union Insurance Company, Globe and Rutgers Fire Insurance Company, The Homestead Fire Insurance Company and New Hampshire Fire Insurance Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 20, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the District Court of the United States in and for the Southern Division of the Northern District of California

No. 26235 H

P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of ASSOCIATED PACKING CO.,

Plaintiffs,

vs.

AGRICULTURAL INSURANCE COMPANY, a Corporation; FEDERAL UNION INSURANCE COMPANY, a Corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a Corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a Corporation, a Corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation; BLUE COMPANY, a Corporation; GEORGE A. LEVY, JOHN DOE, JANE DOE and RICHARD ROE,

Defendants.

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiffs hereby appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the Final Judgment entered in this action, as ordered amended on the 11th day of April, 1949, and that portion only which orders, adjudges and

decrees that plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs, from the 4th day of March, 1946, and ordering that plaintiffs take nothing as and for interest on said amounts.

Dated this 9th day of May, 1949.

/s/ NEIL CUNNINGHAM,
/s/ JAY PFOTENHAUER,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 10, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this court, in the above-entitled case, and that they constitute the Record on Appeal herein, to wit:

Record on Removal containing the Complaint.

Answer to Complaint.

Notice of Demand for Jury Trial.

Amended Answer to Complaint.

Notice of Appeal.

Agreed Statement of Facts.

Reporter's Transcript for January 6, 1948.

Reporter's Transcript for January 10, 1948—Testimony of Arthur L. Miller.

Reporter's Transcript for April 11, 1949—Partial Transcript.

Reporter's Transcript for April 14, 1949—Partial Transcript.

Findings of Fact and Conclusions of Law.

Judgment.

Order Amending Findings of Fact, Conclusions of Law and Judgment.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of June, A.D. 1949.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

United States Court of Appeals for the Ninth Circuit

No. 12275

P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of ASSOCIATED PACKING CO.,

Plaintiffs,

vs.

AGRICULTURAL INSURANCE COMPANY, a Corporation; FEDERAL UNION INSURANCE COMPANY, a Corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a Corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a Corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation; BLUE COMPANY, a Corporation; GEORGE A. LEVY, JOHN DOE, JANE DOE and RICHARD ROE,

Defendants.

STATEMENT OF POINTS AND DESIGNATION

In compliance with Rule 19 of the Rules of the United States Court of Appeals for the Ninth Circuit, appellants hereby designate

Agreed Statement of Facts.

Findings of Fact, Conclusions of Law and Judgment.

Order Amending Findings of Fact.

Notice of Appeal.

Certificate of Clerk.

as the parts of the Record in the above-entitled case which are considered necessary for the consideration by the Court of the appeal herein.

A concise statement of the points on which appellants intend to rely on the appeal follows:

"The contracts of fire insurance (California Standard Form Fire Insurance Policy—Section 2070, Insurance Code) clearly provide for the manner of ascertainment of the amount of loss and that such loss 'shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.'

"Under section 3287, California Civil Code, as construed and applied by the Supreme Court of California in the case of

Koyer v. Detroit Fire & Marine Ins. Co., 9 Cal. 2d 336, a person 'entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover inter-

est thereon from that day, * * *' pursuant to the prescribed provisions of said Standard Form policy.

"Section 1652, Title 28, United States Code, provides that the laws of the several states, with certain exceptions therein stated, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

"In denying to plaintiffs interest on the amount of loss suffered, the District Court failed and refused to adhere to decisions of the California Supreme Court, the Supreme Court of the United States (Concordia Insurance Co. of Milwaukee v. School District No. 98, 252 U. S. 541) and said section 1652, Title 28, United States Code."

Yours very truly,

/s/ NEIL CUNNINGHAM.

[Endorsed]: Filed June 27, 1949.